Court-Packing On the Table in the United States?

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Surprising many Establishment-oriented commentators and legal scholars, several candidates seeking the Democratic Party's presidential nomination have endorsed – or at least have expressed willingness to think about – "Court-packing," that is, increasing the number of Supreme Court Justices to offset the control Republicans gained by what Democrats regard as unfair tactics, such as holding open a vacancy for a year and blocking serious investigation into charges of sexual assault against a nominee.

Court-packing is part of a broader discussion of structural reforms of embedded features of the U.S. constitutional order. Other reforms on the table now appear to include adoption of a national popular vote to elect the President either by constitutional amendment or statutory "work-around". These discussions are reminiscent of the role structural reforms played in a broader agenda of political Progressives in the early twentieth century, reforms that include popular election of Senators and the adoption of initiative and referendum procedures for enacting laws at the subnational level. Though the remainder of this post focuses on Court-packing, it's important to keep in mind the background concern about structural reform more generally.

The U.S. Constitution, unlike many contemporary ones, leaves the size of the Supreme Court to be determined by ordinary legislation. The Court's size has varied from five to ten. Changes in the Court's size have occurred for a combination of technocratic/efficiency reasons and political ones. Typically there has been a reasonable good-government case to be made for changing the Court's size. That case licenses Congress to change the Court's size for political reasons; ordinarily the "good government" change has occurred when the party controlling the government sees political advantage from making the change.

The Court's size has been fixed at nine since 1868. Most readers will be familiar with Franklin Delano Roosevelt's Court-packing proposal, made after the Court had blocked implementation of central features of the first New Deal. FDR offered a fig-leaf "good government" justification for the plan, but rapidly reverted to simple politics. The proposal was defeated after a substantial political battle, though the outcome was in doubt until the very end – and the plan may have failed because Washington's actual temperatures were so high that they caused Senate majority leader Joseph Robinson to have a fatal heart attack, which released votes for the plan that Robinson had lined up based upon his personal ties.

Most readers will also know of the so-called "switch in time that saved nine" – vote shifts by Chief Justice Charles Evans Hughes and Justice Owen Roberts, from striking down New Deal legislation to upholding it. The switch is said to have

effectively accomplished what Roosevelt sought by Court-packing – a change in the Court's constitutional commitments.

Whether a "switch" actually occurred is now quite contested, and the story in detail is extremely complicated. The balance of evidence seems to suggest that a switch did occur. Although one key vote took place before Roosevelt announced the Court-packing plan's details, ideas about Court reform had been swirling around Washington for several years, and the Justices were likely aware of them. One of Chief Justice Hughes's votes, and the opinion he wrote supporting it, is almost inexplicable without reference to the political circumstances. And, an important statistical study seems to show pretty strongly that Justice Roberts shifted to the "left" during the crucial Court Term, then reverted to his more conservative position a year later. (The study shows a similar though less dramatic pattern for Chief Justice Hughes.)

Collateral to the Court-packing plan Congress adopted a new retirement plan for Supreme Court justices, and two of them – Willis Van Devanter and George Sutherland, both of whom had been thinking about retiring for several years – took advantage of the new statute. Their retirements gave Roosevelt his first appointments to the Court, which consolidated the change that had occurred. (Whether the retirement statute would have been adopted if Roosevelt hadn't proposed Court-packing is unclear. The retirement proposal had been rattling around for several years, and its sponsor might have seen a chance to get it through because people were thinking about legislation dealing with the Court. It doesn't seem that the sponsor used the retirement proposal as a deliberate effort to weaken support for Court-packing.)

Roosevelt is said to have paid a high political price in the Court-packing fight. His political agenda did lose momentum, although a substantial recession in 1937 and the rise of concerns about the international scene clearly played their parts in changing the political balance as well. Still, the failure of the Court-packing plan has until recently been taken by Establishment figures as demonstrating that changing the Court's size for political reasons is out of bounds politically.

The case for Court-packing is basically instrumental. The Democratic Party will be in a position to pack the Court only if they win control of Congress and the Presidency. If they do *that*, they are going to have an ambitious substantive agenda – the so-called Green New Deal, health care reform, and a so-called democracy agenda that includes expanded voter registration, limits on gerrymandering, and more. Yet, the conservative Supreme Court is in a position to – and, proponents of Court-packing fear, is likely to – find substantial parts of that substantive agenda unconstitutional. Court-packing is insurance against that possibility.

The increasing politicization of the Supreme Court – evident from early in this century – may have made Court-packing thinkable again. Opponents have raised several points in response. One is straight-forwardly political: Putting Court-packing on the table will mobilize Republican opposition without motivating enough Democrats, and so is politically unwise. Others sound in principle. Court-packing risks retaliation when, as is inevitable, Republicans regain control of Congress and

the Presidency. Openly treating the Court as primarily a political institution weakens its legitimacy and might make it unavailable to protect democracy against future threats.

Proponents of Court-packing have responses to these objections. They say that though Republican control over the government is indeed inevitable, it's not clear how quickly that would occur, and by the time it does the Republican Party's commitments may have changed significantly. They say as well that Republicans themselves have politicized the Supreme Court, whose legitimacy could be reduced only marginally by a Democratic response. And, probably most important, they contend that without Court-packing Democrats will be unable to accomplish much – and so voters won't see much value in voting for Democrats.

It seems unlikely at this point that Court-packing will have a high priority if Democrats win the Presidency and Congress in 2020. In that event Democrats will likely focus on their substantive goals. They might discover – perhaps too late – that achieving those goals will be thwarted by a conservative Supreme Court. Yet, it seems worth observing that structural reforms like Court-packing appear to be on the table in ways they haven't been for several decades. The Progressives of the early twentieth century didn't accomplish their reforms in a single election, but they eventually prevailed. Perhaps there's a lesson there as well.

Disclosure: The author is chairman of the advisory board of @PackSCOTUS.
